

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

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Annual Assessment of the
Status of Competition in the
Market for the Delivery
of Video Programming

)
) CS Docket No. 96-133
)
)

COMMENTS OF PAY-PER-VIEW NETWORK, INC. D/B/A VIEWER'S CHOICE

Pay-Per-View Network, Inc., d/b/a Viewer's Choice ("Viewer's Choice"), by its attorneys, hereby submits its comments in response to the Commission's Notice of Inquiry ("NOI") in the above-captioned proceeding.¹

In attempting to assess the status of competition in the market for the delivery of video programming, the Commission seeks information on the effects of its rules concerning relationships between cable operators and video programming providers, among them, the "channel occupancy" rule.² In promulgating its channel occupancy limits pursuant to the Cable Television Consumer Protection and

¹ FCC 96-265, released June 13, 1996.

² 47 C.F.R. § 76.504.

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Competition Act of 1992,³ the Commission sought to serve the public interest by preventing undue favoritism of vertically-integrated program services, and by promoting the flow of high quality programming to consumers. As discussed below, however, Viewer's Choice submits that this artificial restraint serves no compelling interest and may, in fact, be working to the detriment of consumers by depriving them of the programming they prefer.

I. BACKGROUND

Viewer's Choice is a leading provider of pay-per-view ("PPV") video programming services in the United States. It is owned by two major motion picture companies and seven multiple system cable operators ("MSOs").⁴ Viewer's Choice commenced operation in 1985. Its "Home Premier Television" initially provided one analog channel of PPV programming. Viewer's Choice currently offers cable operators one (1) analog and five (5) digital channels of PPV programming. Viewer's Choice intends to expand its offerings to include eleven (11) channels by the fall of 1996.

Viewer's Choice video programming includes a variety channel available almost twenty four (24) hours per

³ Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act").

⁴ Each of the following holds an equal 10% interest in Viewer's Choice: Warner Bros., Walt Disney, Time Warner Cable, Continental Cable, Comcast, Newhouse, Liberty and Viacom Cable. Cox Cable owns a 20% interest.

day -- this channel carries movies, special events and other programming with broad appeal. In addition, the Viewer's Choice lineup includes a second channel dubbed "Hot Choice," which carries action, adventure, horror and science fiction movies and late evening specials. Viewer's Choice's remaining "Continuous Hits" channels carry box-office hit movies, in some instances replayed continuously for a week, in others, scheduled on a daily rotation.

II. THE CHANNEL OCCUPANCY RULE IS NO LONGER WARRANTED

Viewer's Choice programming channels are available to cable operators who carry one or more of the channels depending on their system capacity and, in many instances, the restrictions imposed by the Commission's channel occupancy rule. The channel occupancy rule limits to forty-percent (40%) of activated channels the number of channels that a cable operator may fill with programming provided by a video programmer in which a cable operator has an attributable interest.

The channel occupancy restrictions do not reflect any deference to consumer preference. No exception is carved out for the most popular channels or for new services. All national services in which the cable operator has an attributable interest, including pay-per-channel services, PPV channels and multiplex channels, which afford time diversity for programming carried at regular times on other

channels, count fully toward the overall forty-percent limit.

At Paragraph 22 of the NOI, the Commission solicits comment on how the channel occupancy rules have impacted competition in the market for the delivery of video programming over the past year. While it is difficult to quantify precisely the impact of the channel occupancy rule, it appears to Viewer's Choice that these restrictions may have limited significantly the ability of affiliated cable systems to offer as many of the pay-per-view services available from Viewer's Choice as they might otherwise choose to offer in response to consumer demand.

A. The Channel Occupancy Rule Adversely Impacts The Availability Of Choice Video Programming To Consumers

The bulk of Viewer's Choice's current audience is comprised of subscribers of cable systems. Channel capacities in these cable systems, are, for the most part, limited. Because a number of cable MSOs have an attributable interest in Viewer's Choice, the Commission's channel occupancy rule effectively may operate to restrict the number of Viewer's Choice services available to subscribers over its affiliated cable systems.⁵

⁵ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, CS Docket No. 95-61, FCC 95-491, 11 FCC Rcd 2060 (1996) ("1995 Competition Report").

As demonstrated in the Commission's 1995 *Competition Report*, cable operators face growing competition from alternative multichannel video programming distributors such as direct broadcast satellite ("DBS") services and, increasingly, from wireless cable and telephone company programming providers. Through digital compression techniques, DBS and telephone companies, in particular, have or will have abundant capacity through which to take full advantage of service offerings like that of Viewer's Choice. Cable operators affiliated with Viewer's Choice, however, in large part have limited capacity, and are constrained by the Commission's channel occupancy rules in freely determining how to maximize that capacity by carrying programming best suited to their audience's desires. While their DBS and telephone company competitors may offer the full range of Viewer's Choice services, affiliated cable MSOs may be unfairly restricted from doing so, to the advantage of their competitors and to the detriment of competition, and, thus, to the detriment of consumers.

Viewer's Choice believes that the channel occupancy limits are contrary to the public interest precisely because they restrict cable subscribers' access to programming which might be more compelling than programming carried in its place. Even where a cable operator has capacity available, once the forty-percent limit is reached or neared, that operator, loath to have empty channels, will fill channels with unaffiliated programming simply to prevent them from

being vacant. The operation of the channel occupancy rule in this manner does not necessarily serve the public interest, however, as the programming carried on a vacant channel may be much less desirable to the consumer than the programming barred from that channel through the operation of the occupancy limitation.

Further, because of the channel occupancy rule limitations and the fact that some of the largest cable MSOs have attributable interests in Viewer's Choice, it has been difficult for Viewer's Choice to implement its pro-consumer business strategy. While, in response to consumer demand, Viewer's Choice wishes to expand its service to offer subscribers more choices and to move closer to "video-on-demand," the channel occupancy rule has served to severely restrict its ability to do so. Only upon the rebuild of existing affiliated cable systems or the employment of compression techniques on these systems will sufficient capacity be available to counteract the occupancy limitations.

B. The Inability of Viewer's Choice to Maximize Its Carriage on Affiliated Cable Systems Will Adversely Affect Its Ability to Obtain Quality Programming

Much of the programming carried by Viewer's Choice consists of recently-released theatrical motion pictures and live events. The owners of these programs naturally desire to license them to the PPV provider who can offer the largest possible potential audience. To the extent that

Viewer's Choice is artificially constrained through the operation of the channel occupancy rule from maximizing the available audience of cable subscribers it can offer, it may suffer a competitive disadvantage in attracting high quality programming. If PPV providers not affiliated with cable operators are able to offer a greater potential return to program owners, the program owners understandably and undoubtedly will choose to license their product to these competitors of Viewer's Choice.

C. The Channel Occupancy Rule Serves No Compelling Interest

In the 1992 Cable Act, Congress directed the Commission to balance the risks of vertical integration against benefits such as the development of diverse and high quality programming. The channel occupancy rule, as it stands, does not strike the appropriate balance and offers no public interest benefit sufficient to outweigh the substantial detriments discussed above. Viewer's Choice believes the occupancy restrictions to be fundamentally unsound in that they are based on the unsubstantiated premise that a cable operator with a minority, non-controlling interest in Viewer's Choice would carry that programming in preference to superior programming offered by an unaffiliated vendor. Especially in an environment where the cable subscriber has alternative choices from DBS, wireless cable, and telephone company programmers, these artificial restraints on competition are no longer warranted. There is simply no

evidence that the occupancy restrictions have resulted in greater consumer satisfaction, and to the extent they interfere with consumer satisfaction by depriving the public of programming it prefers, these limits are contrary to the public interest.

III. CONCLUSION

In light of the foregoing, the Commission's Third Annual Report to Congress concerning the status of competition in the market for the delivery of video programming should contain a determination that the channel occupancy rule is no longer warranted.

Respectfully submitted,

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d/b/a VIEWER'S CHOICE

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